IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

CRIMINAL APPEAL No.227 of 2001
(Old No. 735 of 1985)

Gurnam Singh S/o Balwant Singh,
R/o P.S. Sitarganj, Distt. Nainital

.....Appellant

Versus

The State

... Opposite Party

Dated: June 07, 2007

Mr. R.S. Sammal, learned counsel for the appellant
Sri M.A. Khan, learned brief holder for the State

HON. DHARAM VEER, J.

This criminal appeal, preferred under Section 374(2) of Code of criminal Procedure, 1973, is directed against the judgment and order dated 26.02.1985 passed by Special Judge (Additional Sessions Judge) Nainital in Sessions Trial No. 205 of 1983, State Vs. Gurnam Singh & Balwant Singh, whereby the learned Special Judge (Addl. Sessions Judge) has convicted the appellant Gurnam Singh u/s 325 I.P.C. and sentenced him to undergo 18 months R.I. and awarded a fine of Rs. 3,000/- and in default of fine to undergo one year R.I. The appellant Gurnam Singh was acquitted for an offence punishable u/s 307 IPC. However, the accused Balwant Singh was not found guilty of the charge framed against him u/s 307 r/w 34 I.P.C. and he was accordingly acquitted.

2. The prosecution story in brief is that about 5-6 years before the incident, the informant Uttam Singh had purchased a land from one Balwant Singh and he was since then in the possession. The sale deed, however, had not executed. It was alleged that Balwant Singh took a loan on this land for installing a water pump. When the

informant came to know about this, he protested and this ended in a quarrel between them. The proceedings u/s 107/116 Cr.P.C. were also initiated against them. Since then the Balwant Singh used to harass the Uttam Singh and he had also encroached upon the said land. The result was that Balwant Singh started having enmity against him. On 21.1.1983 at about 8:00 A.m., Uttam Singh and his son Balkar Singh were going to their field to irrigate the same. Balkar Singh was walking about 10-12 paces ahead of him and when they reached a little ahead of the house of Harbans, Balwant Singh shouted his son Gurnam Singh to kill Balkar Singh by firing at him. Gurnam Singh then fired a pistol shot at Balkar Singh and it hit him on his right thigh and he fell down on the ground. Uttam Singh raised an alarm on which Chinda Singh and Kashmir Singh arrived on the spot. The accused then made good their escape. Thereafter, injured Balkar Singh was brought to Sitarganj where Uttam Singh got a report Ex.Ka2 written. Then Uttam Singh had lodged the same at the Police Station, Sitarganj. Head Constable, Amar Singh wrote the FIR, Ex.Ka-8 on the basis of this report and entered the case in the general diary at report no.20 i.e. Ex.Ka.9. Thereafter, the injured Balkar Singh was taken to the hospital where he was medically examined by Dr. R.S. Jani (PW1) at 12:10 p.m. After that, the investigation of the case was entrusted to S.I. Mahendra Pal Singh (PW5) who recorded the statements of witnesses and after inspecting the place of occurrence, prepared the site plan Ex.Ka.4 He also took blood stained and plain earth from the place of occurrence and sealed them separately and a memo was prepared, that memo is Ex.Ka.5. On the spot, he found one empty cartridge which he took into custody

and a memo was prepared, that memo is Ex.Ka.6. After completing the investigation, he submitted the charge sheet Ex.Ka.7 against the appellant Gurnam Singh and accused Balwant Singh. Thereafter, the charge u/s 307 IPC was framed against the appellant Gurnam Singh and u/s 307 r/w 34 IPC against the Balwant Singh. The appellant Gurnam Singh and the accused Balwant Singh pleaded not guilty claimed to be tried.

3. The prosecution, in support of its case, examined five witnesses namely P.W.1 Dr. R.S. Jani, P.W.2 Uttam Singh who is the informant, P.W.3 injured Balkar Singh, P.W.4 Chinder Singh and P.W.5 S.I. Mahendra Pal Singh, the Investigating Officer. After appreciating the evidence on record, the learned Special Judge (Additional Sessions Judge) Nainital vide his judgment and order dated 26.02.1985 convicted the present and order Gurnam Singh u/s 325 I.P.C. and sentenced him to undergo 18 months R.I. and awarded a fine of Rs.3,000/- and in default of fine, to undergo one year R.I. The appellant was acquitted for an offence punishable u/s 307 IPC. However, the accused Balwant Singh was not found guilty of the charge framed against him u/s 307 r/w 34 I.P.C. and he was accordingly acquitted. Feeling aggrieved against the said order dated 26.2.1985, the appellant Gurnam Singh has come up in appeal before this Court.

4. I have heard Mr. R.S. Sammal, learned counsel for the appellants and Mr. M.A. Khan, learned brief holder for the State.

5. This Court vide order dated 15.04.2002 summoned the lower court record of the case. In

compliance of the order-dated 15.04.2002, In-charge Officer Record Room, District Court, Nainital by his letter dated 24.04.2002 informed that except the English part of the case, the record of the case has been weeded out. Thereafter, on 1.06.2002, this Court again directed to summon the record of the case. In compliance of that order, District Judge, Nainital by his letter dated 06.05.2006, on the basis of the report of Incharge Officer, Record Room, District Court, Nainital informed that after having made sufficient efforts, it is not possible to obtain more documents than already transmitted to this Court. Learned counsel for the appellant Mr. R.S. Sammal and Mr. M.A. Khan, learned brief holder for the State have also stated that the reconstruction of the record is not possible. They also submitted that retrial is also not possible due to the expiry of period of about 24 years. Learned counsel for the appellant placed reliance on a judgment rendered by Allahabad High Court in the case of *Aziz Khan Vs. State of U.P. reported in ACC 1992 (29) 223,* in which it was held as under:-

> **"***In Ram Nath v. State, another Division Bench of our court took the same view that where material available on record was not sufficient to dispose of the appeal on merits and it was not possible to reconstruct the record, no order for retrial should be passed, if incident had taken place long back. In this case, the court took the view that as the incident had taken place 11 years back, it was not proper to direct retrial and the appeal of the accused was allowed and they were acquitted. In the case in hand, the occurrence had taken place on 15.10.1976 i.e. 15 years back and the complete record has not been reconstructed. Applying the principle laid down in the above mentioned authorities, we are of the opinion that the appeal of Aziz Khan should be allowed and his conviction and sentence should be set aside and the government appeal against acquittal of the accused respondents is liable to be dismissed."*

6. In view of the above, the appeal is allowed. The judgment and order dated 26.022.1985 passed by Special Judge (Additional Sessions Judge), Nainital is hereby set aside. The appellant is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged.

(Dharam Veer, J.)

June 07, 2007
Rajeev Dang